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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 526

315 WEST 97TH STREET REALTY CO., INC., ODEM CORPORATION, MAPLE-81ST STREET, INC., and 1165 PARK AVENUE CORPORATION,

Petitioners,

v.

PHILIP B. FLEMING, TEMPORARY CONTROLS ADMINISTRATOR,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS

REPLY BRIEF FOR THE PETITIONERS

CHARLES E. HUGHES, JR.,
Counsel for Petitioners.

CURTISS E. FRANK
BARBARA H. WOODWARD
Of Counsel

Dated: New York, January 2, 1947

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Petitioners do not find it necessary to make any extended reply to respondent's brief in opposition to the application for certiorari herein. So far as respondent's arguments are germane to the issues appropriate for consideration on this application, they have been sufficiently anticipated and met in the petition for certiorari and our supporting brief. To undertake to reply to respondent's several arguments based on selected extracts from the somewhat voluminous record herein, which would be appropriate to argument on the merits in the event that this Court grants the petition, would unreasonably extend our presentation on this application. We think that enough has

been shown in the petition and supporting brief to indicate that the decision of the Emergency Court of Appeals below is of sufficient importance to require review by this Court.

The purpose of this reply brief is chiefly to call attention to two serious inaccuracies of statement in respondent's brief in opposition.

The first is (Respondent's Brief, p. 11) that the Act "requires" the Administrator to fix maximum rents with reference to rents prevailing as of a particular date. All that the Act requires on this subject (Section 2(b)) is that in establishing any maximum rent the Administrator shall "ascertain" and "give due consideration" to the rents prevailing on the dates indicated. But the required ultimate standard of such maximum rents is that they "will be generally fair and equitable and will effectuate the purposes of this Act." And, as we have shown in the supporting brief (pp. 16-18) to the petition, the Emergency Court of Appeals had, until its decision in the instant case, interpreted that standard as requiring "a yield or profit sufficient for its [the industry's] sustenance in a state of efficiency and for reasonable development and expansion."

The other inaccuracy is in respondent's statements (Respondent's Brief, p. 9) that petitioners did not raise the constitutional question before the court below, and that (*id.* pp. 18-19), "* * the court below did not pass upon the constitutional question now sought to be raised by petitioners because petitioners never raised this question below." In our brief in the court below on rehearing, following our argument on the interpretation of the Act (pp. 57-59), we said (p. 59):

> "We submit that, if the Act were so construed as to authorize the Administrator to fix maximum

> rents at so low a level that the entire rental industry in a defense rental area would be prevented from realizing a fair return on its investment, its application as so construed would be contrary to the due process clause of the Fifth Amendment."

The opinion of the court below shows that it considered the question of constitutionality as well as that of interpretation (R. 1045-1046). The Court cited its former decision in *Wilson* v. *Brown* (137 F. (2d) 348 (1943)) as holding "* * that the Administrator was under no statutory *or constitutional** compulsion to provide that the maximum rents of each individual landlord afford him a fair return on the fair market value of his rental property"; and then held that "These observations apply with *equal force* when made as here in connection with the contention that the return from rental housing is not generally fair and equitable to landlords as a whole unless it affords them an adequate fixed rate of return on the investment of the industry as a whole". In the passages between the above-quoted sentences the court below remarked that, in *Wilson* v. *Brown* it pointed out that "* * principles derived from the law of eminent domain or public utility rate making are wholly inapposite", and that "* * under the act there is neither appropriation of the landlord's property nor compulsion upon him to continue his housing accommodations in the rental market", which obviously bore on the question of constitutionality more than on that of interpretation.

It is true that petitioners did not raise constitutional questions in their protest, filed December 7, 1943, sixty days after the issuance of the Rent Regulation, which originated the proceeding before the Price Administrator. But it is

*All italics in quotations in this brief are supplied.

plain that the extracts from the protest which respondent cites (Respondent's Brief, footnote p. 9) referred only to questions with respect to the constitutionality of the Act on its face and "the propriety of establishing rent control and regulation for said New York City Defense-Rental Area *at proper maximum rents.*"* The disclaimer referred to questions of constitutionality appearing on the face of the Act, such as that legislative power has been improperly delegated to the Administrator and that the Act offended the due process clause of the Fifth Amendment in not providing for a fair return to each particular landlord, which were considered by this Court in *Bowles* v. *Willingham,* 321 U. S. 503, discussed in our supporting brief (pp. 26-27). A question such as that here raised, growing out of the application and interpretation of the Act by the Administrator, could not have then been foreseen, and stands on a wholly different basis. Since that question was squarely raised (without any objection on the part of respondent) in the court below, and decided by it, it is open for review here.

Respectfully submitted,

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Counsel for Petitioners.

CURTISS E. FRANK
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Of Counsel

Dated: New York, January 2, 1947

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*This phrase is in the passage from R. 2, which respondent quotes in part, as well as in that from R. 7.